Filed 6/28/19 Williams v. County of San Bernardino Sheriff's Dept. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DONNA WILLIAMS, Plaintiff and Respondent, v. COUNTY OF SAN BERNARDINO SHERIFF'S DEPARTMENT, Defendant and Appellant.	D075077 (Super. Ct. No. CIVDS1517728) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

Pursuant to California Rules of Court, rule 8.264(c), it is ordered that the opinion filed on June 17, 2019, be modified by replacing the second sentence of part I. on page 2 with the following sentence:

> We begin by setting forth how this court must analyze the issues and, accordingly, the limitations on our determination of the merits of the parties' underlying claims and defenses.

There is no change in judgment.

Respondent's petition for modification of the opinion and/or for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties

Filed 6/17/19 Williams v. County of San Bernardino Sheriff's Dept. CA4/1 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DONNA WILLIAMS, Plaintiff and Respondent, v. COUNTY OF SAN BERNARDINO SHERIFF'S DEPARTMENT, Defendant and Appellant.	D075077 (Super. Ct. No. CIVDS1517728)

APPEAL from a judgment of the Superior Court of San Bernardino County, Gilbert G. Ochoa, Judge. Affirmed.

Michelle D. Blakemore and Jean-Rene Basle, County Counsel, Richard D. Luczak, Deputy County Counsel for Defendant and Appellant.

Castillo Harper, Kasey A. Castillo and Michael A. Morguess for Plaintiff and Respondent.

Defendant San Bernardino County Sheriff's Department (Department) appeals from a judgment of the superior court in favor of plaintiff Donna Williams, whom the Department had terminated as a deputy sheriff. The court ruled as follows: The San

Bernardino County Civil Service Commission (Commission) abused its discretion in sustaining the charges against Williams; and Williams suffered a due process violation during the predeprivation proceedings conducted by the Department pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*) (*Skelly* hearing). The judgment granted Williams's petition for writ of administrative mandate and issued the writ, reinstating Williams with back pay, benefits, and interest.

On appeal, the Department contends that the trial court erred on two independent grounds: The judgment is not supported by substantial evidence; and as a matter of law, there was no due process violation during the *Skelly* hearing process. As we explain, because the Department did not meet its burden of establishing that the evidence compels findings in favor of the Department *as a matter of law*—i.e., the Department did not establish a lack of substantial evidence to support the judgment—we will affirm the judgment without having to reach the *Skelly* issue.

I. PRESUMPTIONS AND STANDARDS ON APPEAL

The presumptions on appeal and the standard we must apply in our appellate review of the judgment determine the outcome of this appeal. Because the appellate briefing in this appeal has not acknowledged or properly followed some of these established criteria, we begin by setting forth how this court must analyze the issues and, accordingly, the limitations on our determination of the merits of the parties' underlying claims and defenses.

Initially, the judgment in favor of Williams " ' "is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." ' "

(*Front Line Motor Cars v. Webb* (2019) 35 Cal.App.5th 153, 161 [administrative mandamus appeal]; accord, *Anderson v. Davidson* (2019) 32 Cal.App.5th 136, 144 [same; "strong presumption of correctness" in judgment].) " 'This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Because of this presumption, the Department (as appellant) has the burden of establishing reversible error (*ibid.*); i.e., Williams is not required to establish how or why the judgment should be affirmed.

In an administrative mandamus case like this, the administrative record contains the evidence introduced at the administrative hearing. (Code Civ. Proc., § 1094.5, subd. (a).) Where, as here, the case involves a fundamental vested right, the superior court uses its independent judgment to review a challenged administrative decision. (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 (*Barber*) [peace officer's right to continued employment is a "vested property interest"].) Under this standard, the superior court must independently weigh the evidence in the administrative record and make its own findings. (*Levingston v. Retirement Board* (1995) 38 Cal.App.4th 996, 1000.) This procedure not only allows, but "indeed, it requires," the trial court to reweigh the evidence, including specifically a determination of the credibility of witnesses. (*Barber*, at p. 658; accord, *Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1174 (*Duncan*).) The court must then determine whether the agency's findings are "supported by the weight of the evidence" and, if not, must set aside the administrative decision as an "abuse of discretion." (Code

Civ. Proc., § 1094.5, subd. (c); accord, *Coastal Environmental Rights Foundation v. California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 187 (*CERF*).) In this context, "the weight of the evidence" means "the preponderance of the evidence." (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 368-369.)

Where, as here, an appellate court is reviewing the trial court's exercise of its independent judgment under Code of Civil Procedure section 1094.5, subdivision (c), the appellate court looks to the findings of the trial court, not to those of the administrative agency. (*Duarte v. State Teachers' Retirement System* (2014) 232 Cal.App.4th 370, 383-384 (*Duarte*).) Under this procedure, the appellate court "*must* sustain the superior court's findings if substantial evidence supports them." (*Pasadena Unified School Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 (*Pasadena Unified School Dist.*), italics added; accord, *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824). Stated differently, the trial court's findings, whether express or implied, must be upheld unless they are " ' " 'so lacking in evidentiary support as to render them unreasonable.' " ' " (*Paxton v. Board of Admin.* (2019) 35 Cal.App.5th 553, 559 (*Paxton*).)

" 'In substantial evidence review [of a trial court's exercise of its independent judgment under Code of Civil Procedure section 1094.5, subdivision (c)], the reviewing court defers to the factual findings made below. *It does not weigh the evidence presented by both parties to determine whose position is favored by a preponderance*. Instead, it determines whether the evidence the prevailing party presented was substantial—or, as it

is often put, whether any rational finder of fact could have made the finding that was made below. If so, the decision must stand.' " (*CERF*, *supra*, 12 Cal.App.5th at pp. 187-188, italics deleted and added.) In making this determination, the appellate court must " 'consider the facts in the light most favorable to [the respondent on appeal], giving [the evidence] every reasonable inference and resolving all conflicts in [the respondent's] favor.' " (*Paxton*, *supra*, 35 Cal.App.5th at p. 559.) "When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court." (*Pasadena Unified School Dist.*, *supra*, 20 Cal.3d at p. 314.) The testimony of a single witness, including that of a party, may be sufficient for substantial evidence purposes. (*Duncan*, *supra*, 77 Cal.App.4th at p. 1174, fn. 6; Evid. Code, § 411.[1])

Applying the foregoing concepts to the present appeal, we presume that the trial court's findings are supported by evidence in the administrative record, and the Department has the burden to show "there is no substantial evidence whatsoever to support them." (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 443 (*Harrington*).) Where, as here, there is no statement of decision,[2] " 'the necessary

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1 "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.)

2 The Department requested a statement of decision (Code Civ. Proc., § 632) 19 days after the court submitted the matter and two weeks after the trial court decided the matter. Williams opposed the Department's request as untimely. The record on appeal does not contain a ruling by the court on the Department's request.

findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence.' " (*Espinoza v. Shiomoto* (2017) 10 Cal.App.5th 85, 100 (*Espinoza*) [administrative mandamus appeal].) Significantly, since "we cannot reweigh the evidence," "we do not determine whether substantial evidence would have supported a contrary judgment, but only whether substantial evidence supports the judgment actually made by the trial court." (*Duarte*, *supra*, 232 Cal.App.4th at p. 384.) That is because "[t]he question on appeal is whether the evidence reveals substantial support—*contradicted or uncontradicted*—for the trial court's conclusion[.]" (*Ibid*., italics added; accord, *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72 [same]; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 [even uncontradicted evidence in favor of an appellant does not establish the fact for which the evidence was submitted].)

II. STATEMENT OF FACTS[3]

The incident that prompted the administrative proceedings that led to the lawsuit underlying this appeal took place during the early morning hours of December 7, 2013. At that time, Williams had been a San Bernardino deputy sheriff for slightly under eight years and was then assigned to the High Desert Detention Center.

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3 Because we will be applying the substantial evidence test in our review of the trial court's judgment, we present the facts in a manner that resolves all conflicts and draws all inferences in favor of Williams. (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 387.) We note conflicts in the evidence only where they are pertinent to the issues on appeal. (*Ibid.*)

The night before, Williams and her boyfriend, C.F., attended a Christmas party for the employees of the detention center, after which they and others went out for food and an after-party at another deputy sheriff's house. On their way home, Williams and C.F. went to a Del Taco fast-food restaurant in Adelanto, arriving at the drive-thru lane a little after 4:00 a.m. After they had paid for and received their food, as they attempted to drive away from the pick-up window, the car in front of them blocked their exit. The occupants in that car were two women, driver T.S. and passenger N.T. Apparently they stopped because, after they left the pick-up window, they realized that they had not received one of the items they had ordered.

T.S. got out of her vehicle and began to walk up to the pick-up window. Williams, who was driving, rolled down her window and asked T.S., " 'Could you please move your car?' "—to which T.S. replied, " 'Shut up, you white bitch' " and " 'No one's getting my [*sic*] fucking food until I get mine, bitch.' "[4] Williams did not respond.

By this time, an additional five cars were lined up in the drive-thru lane behind Williams's car. C.F. then got out of the car and asked T.S., " 'Ma'am, could you please move your car?' " C.F. pointed out to T.S. the nearby available parking places and suggested, " 'Just pull your car around there so we can all leave' "—to which T.S. replied, " 'Fuck you, white boy. Ain't nobody leaving until I get my shit.' "

Even though C.F. had not touched T.S., N.T. then got out of the front car, came up behind C.F., physically assaulted him, and yelled, " 'Get your F-ing hands off her.' " In

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4 The Del Taco employee who was working at the pick-up window at the time described Williams and C.F. as "white" and T.S. and N.T. as "black."

an effort to deescalate the situation, Williams got out of the car, identified herself as an off-duty deputy sheriff, and politely asked everyone to return to their cars. At that point, "everything start[ed] escalating," and chaos, screaming, and name-calling ensued.

T.S. and N.T. said: They "hate F'ing pigs"; "their nigger brothers[] have shotguns and they're going to come and get [Williams and C.F.]"; and " 'These are the type of niggers you don't want to mess with.' " Williams and C.F. believed—i.e., found credible and imminent—the women's threats to their lives.[5] In addition, T.S. and N.T. surrounded Williams, "sandwiching her" in between the two. Meanwhile, T.S. chest-bumped Williams, and N.T. punched Williams numerous times in the face and the back of her head with a closed fist.[6]

C.F. interceded in an effort to stop the assault, and Williams was able to get to the Del Taco pick-up window, where she asked an employee to call 911. The employees had already called the authorities, and when the officers arrived, they took statements from the witnesses—which included Williams, C.F., T.S., N.T., and Del Taco employees. By this time, Williams had spoken to one of her colleagues from earlier in the evening, (then) Deputy Sheriff Trainee S.C., who picked up another colleague, Deputy Sheriff F.T., and drove to the Del Taco, where they kept Williams and C.F. company until F.T. and S.C. satisfied that Williams and C.F. "were okay."

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5 When they finally left Del Taco, Williams and C.F. drove an alternate route home, and within a month, they moved to a new residence.

6 Williams suffered a fat lip and lumps on the back of her head.

III. PROCEDURAL HISTORY[7]

T.S. and N.T. filed a lawsuit based on the December 7, 2013 incident at the Del Taco drive-thru—after which the Department commenced an investigation.[8] On the advice of their counsel, neither T.S. nor N.T. participated in the Department's investigation or actions against Williams.

Sergeant P.O. performed the initial internal affairs investigation by interviewing Williams on two dates in March and April 2014 and considering statements provided by C.F. and one of the Del Taco employees who was at the pick-up window at the time of the incident. After completing his investigation, in June 2014 Sergeant P.O. drafted four " 'allegations' "—which ultimately became the four " 'charges' " on which the Department terminated Williams—and a "Notice of Proposed Disciplinary Action." Before authorizing formal action and serving Williams with the notice, a Department "Board of

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[7] In this part of the opinion, we will describe various procedures that took place prior to this appeal. To the extent the evidence adduced during these proceedings is relevant to an issue raised by the Department in the appeal, we will discuss the evidence when we consider the issue at part IV.A., *post*.

[8] The record on appeal does not contain a copy of the complaint, a list of the defendants, or a description of the claims. In its reply brief, the Department notes that its opening brief incorrectly stated that it began its investigation as a result of the civil action by T.S. and N.T. Although the Department provides a different explanation in its reply brief, the record on appeal contains substantial evidence that the investigation followed the lawsuit—namely, a Department sergeant who testified that he was responsible for the administrative investigation, which was commenced because of the lawsuit, and a similar finding by the administrative hearing officer.

Chiefs," chaired by Assistant Sheriff R.C., met to consider and deliberate whether to proceed.[9]

In early June 2014, Captain J.M. served Williams with an "Order of Disciplinary Action." The order formally notified Williams that the Sheriff would terminate her employment with the Department effective July 1, 2014, based on the following four charges:

> "1. On December 7, 2013, while off duty and after drinking alcohol, you used poor judgment when you became involved in a confrontation with [T.S.] and [N.T.]. Said conduct is in violation of [specified County and Department rules and regulations] and is cause for discipline under said rules.
>
> "2. On December 7, 2013, while off duty, you used poor judgment and brought discredit to the Department when you called [T.S.] and [N.T.] 'nigger bitches.' Said conduct is in violation of [specified County and Department rules and regulations] and is cause for discipline under said rules.
>
> "3. On December 7, 2013, while off duty and after drinking alcohol, you used poor judgment when you drove your personal vehicle in violation of the probation terms resulting from your previous driving under the influence conviction. Said conduct is in violation of [specified County and Department rules and regulations] and is cause for discipline under said rules.
>
> "4. On March 20 and April 8, 2014, during administrative interviews, you lied when you denied using the word 'nigger' during a confrontation with [T.S.] and [N.T.] on December 7, 2013. Said conduct is in violation of [specified County and Department rules and regulations] and is cause for discipline under said rules."

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[9] In general, the Board of Chiefs is comprised of five people: the assistant sheriff who has responsibility for the affected employee; the employee's deputy chief; two other deputy chiefs; and the employee's commander. The board reviews the information provided, listens to a statement by the employee (and/or her counsel), and determines whether there is sufficient evidence to proceed.

Thus, the first three charges involved the December 7, 2013 incident at the Adelanto Del Taco drive-thru, and the fourth charge involved her responses to questions during the administrative investigation of the December 7 incident.

A few weeks later, the Department held the required *Skelly* hearing. Assistant Sheriff D.W. was the *Skelly* hearing officer. On June 30, 2014, he issued his decision, which upheld all four charges and officially terminated Williams's employment with the Department.

Williams continued to dispute and deny the charges. Accordingly, she appealed the Order of Disciplinary Action, and on January 27-29, 2015, the Commission heard the matter.[10] The hearing officer received documentary and oral evidence and issued his findings, conclusions, and recommendation in late May 2015.[11] Based on "the evidence . . . as a whole, the pivotal credibility determinations, and the argument," the hearing officer recommended that charges 1 (confronting T.S. and N.T.), 2 (calling T.S. and N.T.

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10 The hearing officer's report indicates the hearing took place on January 27-29, "2013." This appears to be an error, since the report is dated May 25, *2015*, and recites the December *2013* Del Taco incident and the June *2014 Skelly* hearing and decision. Also, the reporter's transcripts of the proceedings are dated January 27, 28, and 29, *2015*.

11 The witnesses included: Assistant Sheriff D.W.; Captain J.M.; Sergeant P.O.; one of the Del Taco employees who was at the pick-up window at the time of the incident; Williams; C.F.; and Deputy Sheriffs S.C. and F.T., the Department employees who came to the Del Taco after the incident and waited with Williams and C.F. T.S. and N.T. refused to be interviewed at any time after the incident, and neither testified at the Commission hearing. The documentary evidence included: notice of proposed termination; order of termination; three CD's containing witness interviews (and transcriptions), photographs, and videos; Williams's written submission from her *Skelly* hearing; and photographs.

"nigger bitches"), and 4 (lying during administrative interviews) be sustained and that charge 3 (probation violation) not be sustained.[12] The hearing officer also determined that, contrary to Williams's argument at the hearing,[13] Williams did not suffer a due process violation during the *Skelly* hearing process.

Williams filed written objections to the hearing officer's findings, conclusions, and recommendation.

By notice dated September 9, 2015, the Commission approved the hearing officer's May 25, 2015 findings, conclusions, and recommendation, thereby sustaining the Department's June 30, 2014 order of termination following the *Skelly* hearing.

In December 2015, Williams initiated the underlying action, in which she petitioned for a writ of administrative mandate compelling the County of San Bernardino (County) to set aside the termination, to reinstate Williams with full pay and benefits, and to remove all references to the termination from her personnel and related files. (See generally Code Civ. Proc., § 1084 et seq.) The County answered the petition, and

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12 Although the hearing officer's recommendation was to sustain charge 2 (calling T.S. and N.T. "nigger bitches"), his findings were that Williams used the word "nigger" and the word "bitches," but not together as charged.

13 Williams contended that the Department violated her due process rights by failing to provide her with the following materials at the *Skelly* hearing: comments made by those who participated at the Department's Board of Chiefs to Sergeant P.O., the internal affairs investigator who drafted the allegations that became the charges for the *Skelly* hearing; the civil lawsuit filed by T.S. and N.T. (see fn. 8 and related text, *ante*); and the audio recording of statements made by T.S. and N.T. to the Department as part of a criminal investigation.

Williams and the County, through the Department, filed briefs in support of their respective positions.

The trial court entertained oral argument, took the matter under submission, and in early May 2017 issued a minute order granting the writ. On May 23, 2017, the court filed a formal Order and Judgment Granting Peremptory Writ of Mandate (judgment). In it, the court ruled that, based on its examination of the entire administrative record and input from counsel: The Commission's findings as to charges 1 (confronting T.S. and N.T.), 2 (calling T.S. and N.T. "nigger bitches"), and 4 (lying during administrative interviews) were "against the weight of the evidence"; the Department's termination of Williams's employment was "an abuse of discretion"; and the Department violated Williams's due process rights during the *Skelly* hearing proceedings.[14] The judgment directed that a writ of mandate issue, and remanded the proceedings with directions that the Department set aside the termination and reinstate Williams with back pay, benefits, and interest.

The Department timely appealed.

IV. DISCUSSION

On appeal, the Department contends that the trial court erred on the following two grounds: The administrative record lacks substantial evidence to support the trial court's findings that the Commission's findings were against the weight of the evidence; and no due process violation occurred during the *Skelly* hearing proceedings. As we explain, because the Department did not meet its burden in establishing a lack of substantial

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14 The record on appeal does not contain any findings of fact or, as we explained at footnote 2, *ante*, a statement of decision.

evidence to support the judgment, we will affirm the judgment without reaching the merits of the due process argument.

A. *Substantial Evidence*

As we introduced at part I., *ante*, we consider only the implied findings of the superior court—i.e., not the Commission's findings—and determine whether they are supported by substantial evidence. (*Duarte*, *supra*, 232 Cal.App.4th at pp. 383-384; *Espinoza*, *supra*, 10 Cal.App.5th at p. 100.) We presume that the implied findings are supported by substantial evidence (*Harrington*, *supra*, 16 Cal.App.5th at p. 443), the Department has the burden of establishing otherwise (*ibid*.), and we may only reverse if the implied findings are " ' " 'so lacking in evidentiary support as to render them unreasonable' " ' " (*Paxton*, *supra*, 35 Cal.App.5th at p. 559).

Where, as here, "the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case." (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 (*Sonic Manufacturing*).) Thus, the question on appeal becomes " 'whether the evidence compels a finding in favor of the appellant *as a matter of law*.' " (*Id.* at p. 466, italics added.)

Here, the Department does not attempt to meet, let alone meet, this standard. Instead, the Department argues that "[t]he overwhelming weight of the evidence supports the three charges upheld by the hearing officer," since "[Williams's] self-serving testimony along with her biased boyfriend . . . does not constitute substantial evidence." Initially, as an appellate court, we do not determine the weight of the evidence or the potential bias of a witness; they are both considerations exclusively for the trier of fact. Moreover, the Department's characterization of Williams's and C.F.'s testimony as "self-serving" or "biased" is an acknowledgement that the record does, in fact, contain evidence to support the judgment, regardless whether the trial court credited the Department's evidence.

In reviewing the administrative record for evidence in support of the superior court's judgment, we "discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact" (*Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 576 (*Hauser*) [administrative mandamus appeal]) and consider "*only* whether substantial evidence supports the judgment actually made by the trial court" (*Duarte*, *supra*, 232 Cal.App.4th at p. 384, italics added). Even the testimony of a single *party* witness may be sufficient for substantial evidence purposes. (*Duncan*, *supra*, 77 Cal.App.4th at p. 1174, fn. 6; Evid. Code, § 411.) Finally, the Department does not explain, let alone cite to evidence in the administrative record in support of, the basis for its suggestion that C.F.'s testimony was "biased"; moreover, we note that, in the trial court—where credibility determinations and factual findings are

made—the Department's opposition to Williams's writ petition did not suggest that C.F. was biased.

In short, the bulk of the Department's presentation on appeal requires us to reweigh the evidence and make credibility determinations, which we are precluded from doing in an appeal from a trial court's exercise of its independent judgment under Code of Civil Procedure section 1094.5, subdivision (c). (*Duarte*, *supra*, 232 Cal.App.4th at p. 384 ["we cannot reweigh the evidence"]; *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 427 (*City of Corona*) ["we do not . . . determine the credibility of witnesses on appeal" (preliminary injunction appeal)].) Weighing evidence and making credibility determinations are tasks assigned exclusively to the trial court in the review of the agency rulings. (*Barber*, *supra*, 45 Cal.App.4th at p. 658; *Duncan*, *supra*, 77 Cal.App.4th at p. 1174.)

With the foregoing background, we will review each charge and explain why the Department did not meet its burden on appeal of establishing that the evidence compels a finding in favor of the Department *as a matter of law*. (*Sonic Manufacturing*, *supra*, 196 Cal.App.4th at p. 466.)

1. *Charge 1 (Confronting T.S. and N.T.)*

Charge 1 alleges that Williams used poor judgment when she "became involved in a confrontation" with T.S. and N.T. at the Del Taco drive-thru.

The administrative record contains substantial evidence to support the following findings. When Williams first confronted T.S. and N.T., she rolled down the window of her car and, in a "[p]olite" tone of voice, asked T.S., " 'Ma'am, could you please move

your car?' " After C.F. left Williams's car and was speaking with T.S., N.T. got out of the front car, came up behind C.F., physically assaulted him, and yelled, " 'Get your F-ing hands off [T.S.].' " In an effort to deescalate the situation, Williams got out of the car, identified herself as an off-duty deputy sheriff, and asked everyone to return to their cars. After being verbally and physically assaulted by T.S. and N.T.—including a chest-bump and numerous punches in the face and the back of the head—Williams withdrew, went to the Del Taco pick-up window, and asked an employee to call 911.

On appeal, the Department argues that the foregoing evidence "is not reasonable, credible, and of solid value when considering the whole record." The Department suggests that in "considering the whole record," the evidence on which Williams relies is contradicted by other evidence. Although the Department cites to contradictory evidence in the record, the Department does not explain why or how such contradictory evidence *compels* a finding in favor of the Department as a matter of law. (*Sonic Manufacturing*, *supra*, 196 Cal.App.4th at p. 466; see *Hauser*, *supra*, 20 Cal.App.5th at p. 576.) In short, the Department's position is that the evidence on which it relies is more persuasive than the evidence in support of the trial court's judgment.

We reject the Department's suggestion that we "examin[e] [Williams's] evidence pursuant to Evidence Code section 780" because, according to the Department, "both [Williams] and [C.F.] provided self-serving testimony that was contradicted by [other evidence.]" Evidence Code section 780 sets forth 11 matters that *the trier of fact* "may

consider in determining the credibility of a witness."[15] (*City of Corona*, *supra*, 166 Cal.App.4th at p. 427.) Moreover, the fact that testimony is self-serving does not make it insubstantial. (*Duncan*, *supra*, 77 Cal.App.4th at p. 1174, fn. 6; Evid. Code, § 411.)

In fact, even the hearing officer's findings, approved by the Commission, contain evidence that fully support the judgment of the superior court. The hearing officer expressly determined that, by identifying herself as an off-duty deputy sheriff when she first left her car to approach T.S. and N.T., Williams had the intent to "calm[] this situation," and "the reasonable inference to draw is that [Williams] desired to arrest the confrontation[.]" According to the hearing officer, this action and the action of withdrawing to ask the Del Taco employee to call 911 (after Williams had been chest-bumped and punched) showed " 'good judgment' " on Williams's part. The Department neither mentions this evidence nor attempts to explain how or why it is not substantial.

For the foregoing reasons, as to charge 1, the Department did not meet its burden of establishing that the evidence compels a finding in the Department's favor as a matter of law (or that the administrative record lacks substantial evidence to support the trial court's implied finding that the Department did not prove charge 1).

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15 For example, the administrative hearing officer properly relied on Evidence Code section 780 in making his credibility determinations. While the trial court did not cite to Evidence Code section 780, it, too, was required to make credibility determinations. (*Barber*, *supra*, 45 Cal.App.4th at p. 658.)

Evidence Code section 780 provides: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [listing of 11 examples in subdivisions (a)-(k)]."

2. *Charge 2 (Calling T.S. and N.T. "Nigger Bitches")*

Charge 2 alleges that Williams called both T.S. and N.T. "nigger bitches."

The Department repeats two of its earlier arguments in the context of charge 2. First, according to the Department, "the only evidence" in support of the trial court's finding (that the weight of the evidence in the administrative record does not support charge 2) is Williams's "own self-serving statements coupled with [C.F.], her boyfriend." Second, the Department contends that the evidence on which Williams relies—which, at a minimum, includes Williams's and C.F.'s testimony—"is both suspect under Evidence Code section 780 and flies in the face of the objective evidence provided at the hearing." For the reasons stated at part IV.A.1., *ante*, we reject this argument. In doing so, we again note that, even if we were able to reweigh evidence or make credibility determinations—which we are not (*Duarte*, *supra*, 232 Cal.App.4th at p. 384; *City of Corona*, *supra*, 166 Cal.App.4th at p. 427)—the Department does not suggest why the evidence on which the Department relies is more objective or more credible than the evidence on which Williams relies.

With no evidence that Williams ever used the phrase "nigger bitches," the Department argues that "[t]he preponderance of the evidence" supports a finding that Williams called T.S. and N.T. "bitches" and a finding that Williams called T.S. and N.T. "niggers."[16] At best this argument suggests that Williams used each of those words—

16 The Department presents a full-page argument in its opening brief as to how, even if Williams did not use the phrase "nigger bitches" as charged, Williams's alleged use of

separately. However, such an argument is unhelpful in establishing either (1) that the evidence compels a finding, as a matter of law, that Williams called both T.S. and N.T. "nigger bitches" (see *Sonic Manufacturing*, *supra*, 196 Cal.App.4th at p. 466); or (2) that the record is " ' " 'so lacking in evidentiary support' " ' " as to render unreasonable the trial court's implied finding that Williams did not call both T.S. and N.T. "nigger bitches" (see *Paxton*, *supra*, 35 Cal.App.5th at p. 559). Indeed, the Department's argument that *the preponderance* of the evidence supports one finding implies that there is *other evidence in the record* that supports a contrary finding, yet the Department does not mention the other evidence or discuss its substantiality.

For the foregoing reasons, as to charge 2, the Department did not meet its burden of establishing that the evidence compels a finding in the Department's favor as a matter of law (or that the administrative record lacks substantial evidence to support the trial court's implied finding that the Department did not prove charge 2).

3. *Charge 4 (Lying During Administrative Interviews)*

Charge 4 alleges that, "during administrative interviews" in March and April 2014, Williams "lied when [she] denied using the word 'nigger' " during the December 7, 2013 confrontation with T.S. and N.T.

In its appellate briefing, the Department *incorrectly* explains both the charge and the trial court's ruling. The Department describes the charge as being that Williams "lied in the course and scope of her duties as a peace officer"—a different and much broader

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each of the individual words is a violation of five different Department rules or regulations.

charge; and the Department describes the trial court's ruling as finding that "[Williams] told the truth during her administrative investigation." In fact, the charge is that Williams made the same specific lie at two specified hearings; and the trial court's ruling is that the weight of the evidence did not support a finding that Williams lied.[17] Accordingly, we only consider the Department's presentation as it applies to the *actual* charge (that Williams lied at the two specified interviews) and to the *actual* trial court ruling (that weight of the evidence does not support that charge).

The Department continues to employ an improper standard by emphasizing that "there is overwhelming and incontrovertible evidence that Williams lied" without explaining how or why such evidence requires a finding to sustain charge 4 as a matter of law. Where, as here, there is evidence to support the trial court's implied finding, we, as a reviewing court, do not consider, let alone reweigh, evidence that is unfavorable to Williams or the judgment. (*Hauser*, *supra*, 20 Cal.App.5th at p. 576; *CERF*, *supra*, 12 Cal.App.5th at p. 187.)

According to the Department, at each of the two interviews, Williams denied using the word "nigger" during the December 2013 confrontation at the Del Taco drive-thru. The Department argues that those statements are lies because: (1) At the June 2014

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17 The Department also presents evidence of Williams's statements from proceedings other than the administrative interviews—e.g., the June 2014 Board of Chiefs, an "unemployment hearing" that contains no record reference, and the January 2015 administrative hearing—that the Department acknowledges is *consistent* with her statements at the March and April 2014 interviews. The Department fails to explain the significance of this other evidence, since what was said *at those other proceedings* does not support a charge of lying *at the interviews*.

Skelly hearing, Williams "finally acknowledged that she may have said the word 'nigger,' though she stated she was surprised that she would say it"; and (2) other witnesses presented evidence that Williams in fact used the word "nigger" during the confrontation. As we explain, this evidence does not compel a finding in favor of the Department as a matter of law; nor does the Department's argument establish that the record lacks substantial evidence to support an implied finding that charge 4 is against the weight of the evidence.

Initially, the Department's record references do not support the Department's contention that, at the *Skelly* hearing, Williams "acknowledged that she may have said the word 'nigger' " during the incident at the Del Taco drive-thru. To the contrary, the portions of the record cited by the Department establish that, even if there is evidence that someone else believed Williams said "nigger" on the morning in question, Williams did not recall saying it and denied having said it.

One record reference is to a paragraph in a letter Williams submitted in her defense at the *Skelly* hearing, in which she wrote:

> "I have heard the tapes and I have read the reports and I cannot dispute that. Given the way I was raised and my strong morals and values and being a Christian woman, I am having a hard time accepting the fact that I could have possibly used the 'N' word that night. In fact I am embarrassed to hear that I may have uttered that word. I am being very honest saying that I just don't talk or think that way. I just can't wrap my head around this. Also, I am so against using the 'N' word given my family background,[18] I 'despise' that word and all it stands for. I am being very honest

18 In the preceding paragraph of the letter, Williams explained that she comes from a family with mixed-race siblings, and one of her brothers is African-American.

> attesting to the fact that I just don't talk or think that way. It is not common for me to use that type of derogatory language and it's not in my vocabulary. I can only compare the 'N' word to that of using God's name in vain. It's just not in my nature and *I do NOT recall ever saying it. I'm not lying about that.* I am being honest about what I/Donna Williams remembers [*sic*] that night." (Italics added.)

While this paragraph contains evidence that can be read to imply that Williams acknowledged saying the word "nigger," the end of the paragraph clearly and unequivocally contains evidence that Williams denied any recollection of saying the word. Since we must review the evidence " 'in the light most favorable to [Williams], giving [the evidence] every reasonable inference and resolving all conflicts in [Williams's] favor' " (*Paxton, supra*, 35 Cal.App.5th at p. 559), we cannot conclude that this paragraph of the letter contains evidence that requires, as a matter of law, a finding that sustains charge 4.

The next record reference cited by the Department is to testimony from the *Skelly* hearing officer, Assistant Sheriff D.W., that, "during the *Skelly* hearing, [Williams's] own attorney admitted that it was obvious that the word ["nigger"] was used in the case." This does not establish a lack of substantial evidence that Williams did not lie (nor does it establish that Williams did lie) for at least the following reasons: (1) The witness did not testify that Williams's attorney admitted that *Williams, as opposed to other participants*, used the word, and we may not infer otherwise (*Pasadena Unified School Dist.*, *supra*, 20 Cal.3d at p. 314; *Paxton*, *supra*, 35 Cal.App.5th at p. 559); (2) the witness's testimony is hearsay (Evid. Code, § 1200, subd. (a)); and, most persuasively, (3) since an unsworn statement by a party's attorney at a hearing is *not evidence* (*In re Zeth S.* (2003) 31

Cal.4th 396, 414, fn. 11), a hearing officer testifying about the attorney's statement does not make the statement evidence.

The final record reference cited by the Department is to additional testimony from the *Skelly* hearing officer. There, Assistant Sheriff D.W. explained that, at the *Skelly* hearing, Williams "realized that the words were used." However, in the same breath, the witness acknowledged that, regardless of this realization, Williams contended that her prior statements were not lies. According to the witness, at the *Skelly* hearing Williams remained steadfast that she did not recall saying the word "nigger" during the incident at the Del Taco drive-thru; but that, if she did say the word, then her inconsistent statements at the initial interviews were "mis-recollection[s]." With this type of conflicting evidence—by the witness in the same response—no party is entitled to a ruling as a matter of law.

Moreover, even though the Department has cited us to evidence from other witnesses who may have recalled the facts differently does not mean the Department is entitled to a finding in its favor as a matter of law.[19] Even if, as the Department contends, each of these witnesses' testimony was that Williams said the word "nigger" during the Del Taco incident, such evidence merely conflicts with the evidence in support of both the implied finding in favor of Williams and the judgment. The standard is not whether the record contains substantial evidence to support a ruling the Department

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19 These witnesses include: the Del Taco employee who was at the pick-up window; the two Department employees who met and kept Williams and C.F. company at the Del Taco after the incident; and the assistant sheriff who conducted the *Skelly* hearing.

wishes the court had made, but whether such evidence "compels a finding in favor of [the Department] as a matter of law" (*Sonic Manufacturing*, *supra*, 196 Cal.App.4th at p. 466).

Finally, in its reply brief, the Department argues that, at the hearing on Williams's petition, the court "acknowledg[ed] the lie while dismissing its significance." We are not persuaded by the Department's reliance on the court's statements at the hearing, since "oral remarks or comments made by a trial court may not be used to attack a subsequently entered order or judgment." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1009; accord, *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 667, fn. 9 [trial court's remarks "not embodied in the written findings or judgment . . . may not be used to impeach the findings" actually made or inferred].) We are reviewing the judgment, not the court's comments made during oral argument prior to any ruling.[20]

For the foregoing reasons, the Department did not meet its burden on appeal to establish an entitlement to a finding in its favor as a matter of law as to charge 4.

4. *Conclusion*

Since we have concluded that the Department did not meet its burden of establishing reversible error as to the trial court's ruling that the Commission's findings as to charges 1, 2, and 4 are against the weight of the evidence in the administrative record,

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[20] In any event, we disagree with the Department's characterization of the court's statements as "acknowledging the lie while dismissing its significance." The exchange during oral argument was nothing more than the court posing a hypothetical question to counsel.

the Department did not establish reversible error in the granting of the writ of mandate. In so ruling, we express no opinion as to the merits of either the Department's charges or Williams's defenses. As required by the applicable standards, we have presumed the correctness of the superior court's judgment and considered the Department's presentation as to whether the administrative record lacks evidentiary support to render unreasonable the implied findings in support of the judgment.

B. *Due Process*

On appeal, the Department challenges the trial court's ruling that Williams's due process rights were violated during the *Skelly* hearing process. The remedy for such a violation is an award of backpay from the date of termination until the date of correction of the constitutional infirmity. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 403; *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147, 1161 [remedy for *Skelly* violation " 'is to award back pay for the period of wrongful discipline' "].)

At part IV.A., *ante*, we concluded that the trial court did not err either in ruling that the Commission's findings as to charges 1, 2, and 4 are against the weight of the evidence or in issuing the writ of mandate—which commanded the Department to set aside its September 9, 2015 Notice of Administrative Decision (sustaining the Department's June 30, 2014 order terminating Williams's employment following the *Skelly* hearing) and to "reinstat[e] [Williams] to her position retroactively to the date of termination *with back pay, benefits or the value thereof, and interest calculated therefrom*." (Italics added.)

Since Williams will receive no more or no less regardless whether she suffered a due process violation during the *Skelly* hearing process, we decline to reach the issue[21] and express no opinion as to its merits.

V. DISPOSITION

The judgment of the superior court is affirmed. Williams is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

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21 Williams agrees.